



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE May 16, 2019

TO Joint Minerals, Business and Economic Development Interim Committee

FROM Brian Fuller, Staff Attorney

SUBJECT Topic Summary: Wyoming Energy Authority

This summary provides background information on the Wyoming Energy Authority, an interim topic that Management Council has approved for this Committee to study during the 2019 interim. This summary provides an overview of 2019 Senate File 0037 and the Wyoming Energy Authority, issues the Committee may wish to consider before the Energy Authority commences in 2020, and an overview of courts analyzing the nature of an authority.

Approved Interim Topic

Priority No. 4: Wyoming Energy Authority

The Committee will receive reports, updates, and recommendations regarding shaping the Wyoming Energy Authority and will consider legislation necessary for the Authority's commencement in 2020.

Overview of 2019 Senate File 0037

This Committee considered the creation of the Wyoming Energy Authority during the 2018 interim. The Legislature passed Senate File 0037, which creates the Wyoming Energy Authority by consolidating into one the Wyoming Pipeline Authority (WPA) and the Wyoming Infrastructure Authority (WIA).¹ The Wyoming Energy Authority will

¹ 2019 Wyo. Session Laws Ch. 34, § 1. The bill is available at <https://www.wyoleg.gov/2019/Enroll/SF0037.pdf>.

commence on July 1, 2020.² Similar to the WPA and the WIA, the Wyoming Energy Authority will be "a body politic and corporate operating as an instrumentality of the state of Wyoming, with authority to adopt an official seal and to sue and be sued."³ The bill provides that the "sole recourse of any party contracting with the authority shall be against the authority, and there shall be no cause of action against the state, or any county, municipality or other political subdivision of the state."⁴

The Energy Authority will have a board of seven voting members; the first members' initial terms are staggered.⁵ Of these seven voting members, a majority must be qualified voters of the state of Wyoming.⁶ Further, the voting members "shall have special knowledge, education or experience in the field of energy or natural resource development, transmission, generation, transportation, financing or marketing, or a field related to industrial or municipal energy consumption."⁷ There are several ex officio members of the Energy Authority's board, including a member of the Wyoming Enhanced Oil Recovery Commission, the chairman of the Wyoming Business Council (or a designee), the governor (or a designee), the chairman of the Wyoming Oil and Gas Conservation Commission (or a designee), and the director of the University of Wyoming School of Energy Resources (or, if there is no director, a member of the School).⁸

Currently, the WIA's and the WPA's boards each have five members.⁹ Each board must have a majority of members who are qualified voters of Wyoming.¹⁰ For the WPA, the members must have special knowledge in the field natural gas or associated natural resource production.¹¹ For the WIA, a majority of members must have special knowledge "in the field of electric or energy transmission or generation development, or natural gas or coal production, transportation, marketing or industrial or municipal consumption." There is no provision in Senate File 0037 for existing board members of the two

² W.S. 37-5-502(a), as created by 2019 SF0037.

³ Id.

⁴ W.S. 37-5-607, as created by 2019 SF0037. See also W.S. 37-5-103(b).

⁵ W.S. 37-5-502(b), as created by 2019 SF0037.

⁶ Id.

⁷ Id.

⁸ W.S. 37-5-502(c), as created by 2019 SF0037.

⁹ W.S. 37-5-101(b); W.S. 37-5-301(b).

¹⁰ Id.

¹¹ W.S. 37-5-101(b).

authorities; the only directive is that the governor must submit appointments for the Energy Authority by the required date during the 2020 Budget Session.¹²

For the most part, the Energy Authority will have the same powers and duties as the WPA and the WIA did, although some of the purposes and duties are new. Those purposes include:

- Diversifying and expanding the Wyoming economy through improvements in the state's electric and energy infrastructure;
- Assisting with permitting, siting, and other regulatory requirements;
- Consolidating energy staff and functions existing in the state energy program and act to administer the state energy program, including seeking federal grants and loans, seeking to participate in federal programs, and administer federally funded state energy programs;
- Assisting with obtaining financing and funding for energy projects by using bonding authority, grants, loans, and investments;
- Developing programs that educate on energy resources and emerging technologies, including tours, academic programs, and communication plans;
- Engage with international and domestic stakeholders on market opportunities;
- Plan, finance, construct, develop, acquire, maintain, and operate a pipeline or other transportation systems to facilitate the production and delivery of associated natural resources.¹³

The Energy Authority is also directed to consult with this Committee and the governor to develop and administer the Wyoming Energy Strategy.¹⁴

The Energy Authority would also have similar powers and duties to the two existing authorities, including bonding authority, the use of net revenues, the power to issue subpoenas, and authority to finance other projects. For the Energy Authority's authority to finance other projects, the Energy Authority would have the same monetary limits for pipeline projects as the WPA did (\$3 billion) and for infrastructure projects as the WIA did (\$1 billion).¹⁵ The bill provides that the merger will not impair any existing contracts,

¹² See 2019 Wyo. Session Laws Ch. 34, § 5; see also W.S. 28-12-101(a)(ii) (requiring the governor to submit appointments to the Senate by the twelfth working day of the budget session).

¹³ W.S. 37-5-503(a), as created by 2019 SF0037.

¹⁴ W.S. 37-5-503(a)(vii), as created by 2019 SF0037.

¹⁵ See W.S. 37-5-602(a) and (b), as created by 2019 SF0037; see also W.S. 37-5-203(a) and 37-5-403(a).

agreements, outstanding bonds, or other obligations of the WPA and the WIA; the bill directs the Energy Authority to assume and fulfill those obligations.¹⁶

Committee Duties and Issues to Consider

Senate File 0037 also directs this Committee to study the impacts of the Energy Authority consolidation during the 2019 interim. Specifically, the bill directs the Committee:

To study before October 1, 2019 the impacts this act will have on the statutory duties and responsibilities of the Wyoming pipeline authority and the Wyoming infrastructure authority. This study shall include the bonding authority of the separate authorities and the effect of merging them into one (1) authority, including the effect merging will have on existing bonds and other obligations and changes that may incentivize increased utilization of bonds.¹⁷

The WIA and the WPA are both directed to assist the Committee in this study as this Committee requests.¹⁸ The Committee is directed to "sponsor any necessary legislation to correct or improve the outcome of any issue identified in its study."¹⁹ Further, the WIA executive director is required to prepare a plan for reorganization of the authorities and their offices, programs, and functions for submission to the Committee by May 15, 2019 for consideration at the Committee's first meeting.²⁰

The Committee may wish to consider the following issues related to the Wyoming Energy Authority, as identified in the bill and by the chairmen:

- The Energy Authority's bonding authority and existing bonds and obligations;
- The state energy program and consolidation into the Energy Authority;
- The Energy Authority's role in addressing issues related to and playing a role in programs involving the Federal Energy Regulatory Commission;
- The composition of the Energy Authority's voting board members, and whether more specific language mirroring the Pipeline Authority's board requirements is needed.

¹⁶ 2019 Wyo. Session Laws Ch. 34, § 1(b); see also Wyo. Const. art. 1, § 35 (providing that no "law impairing the obligation of contracts . . . shall ever be made).

¹⁷ 2019 Wyo. Session Laws Ch. 34, § 1(c).

¹⁸ Id.

¹⁹ Id.

²⁰ 2019 Wyo. Session Laws Ch. 34, § 1(d).

Characteristics of an Authority versus an Agency: An Overview

This topic summary concludes with a brief overview of the characterization of the Wyoming Energy Authority as an "authority," and differences between this characterization and state agencies. Among other things, the distinction may play a role in determining the applicability of bonding and debt limitations in the Wyoming Constitution and statutes and questions of immunity of the Energy Authority.²¹ Research revealed no case where a Wyoming court has expressly outlined the differences between an "agency" and an "authority." But there are cases that are instructive in clarifying how a court may view the Wyoming Energy Authority.

In the first case, Witzenburger v. State, the Wyoming Supreme Court addressed the status and nature of the Wyoming Community Development Authority (WCDA) for the purposes of determining whether that authority violated constitutional provisions related to bonds.²² The WCDA's enabling statute described the WCDA as "a body corporate and politic, constituting a political subdivision of the state operated solely for public benefit."²³ To determine the WCDA's status, the Court used the WCDA's character, relations, and functions to determine its nature.²⁴ The Court concluded that, because it lacked the essential characteristics of a political subdivision, the WCDA was not a political subdivision of the state even though those words were expressly used in statute.²⁵ The Court stated that the Legislature "did not intend to create the [WCDA] to be a state agency" because it declared it to be "a body corporate and politic."²⁶

The Ninth Circuit also has considered the WCDA's nature in the context of sovereign immunity.²⁷ The WCDA attempted to assert sovereign immunity as an arm of the state of Wyoming from a lawsuit concerning bonds the WCDA had issued.²⁸ The Ninth Circuit disagreed, concluding that the WCDA was not an arm of the state of Wyoming for the following reasons:

²¹ See, e.g., Wyo. Const. art. 16, § 1 (limiting the state's ability to create debt that exceeds one percent on the assessed value of the state's taxable property); Wyo. Const. art. 16, § 2 (requiring any debt created in excess of taxes for the current year to be submitted to a vote); Wyo. Const. art. 16, § 6 (prohibiting the state from engaging in "any work of internal improvement unless authorized by a two-thirds vote of the people").

²² Witzenburger v. State, 575 P.2d 1100, 1110 (Wyo. 1978).

²³ Id.

²⁴ Id. at 1114.

²⁵ Id. at 1110.

²⁶ Id.

²⁷ See Durning v. Citibank, 950 F.2d 1419 (9th Cir. 1992).

²⁸ Id. at 1421.

- The State did not pledge its funds to support the obligations of the WCDA;
- The WCDA's enabling statute "unequivocally grants the Authority the power to 'sue and be sued' in its own right";
- The WCDA had "extensive powers to contract in its own name and to organize and manage its own affairs independent of state interference";
- The WCDA had "its own independent corporate identity" and was defined "as a separate entity in contradistinction to the 'State'."²⁹

Although the case did not concern a Wyoming entity, the Tenth Circuit has outlined various factors to use to determine whether a governmental entity is an arm of the state for purposes of 11th Amendment sovereign immunity:

- How the entity is characterized under state law;
- How much guidance and control the state exercises over the entity;
- How much funding the entity receives from the state;
- Whether the entity can issue bonds and levy taxes;
- Whether the state bears legal liability to pay a judgment against the entity.³⁰

Finally, the Wyoming Supreme Court has discussed the nature of a governmental entity for the purpose of determining whether statutory and constitutional limitations would apply to that entity. In Laramie Citizens for Good Government v. Laramie, the Wyoming Supreme Court considered whether an entity the city of Laramie created (The City of Laramie Facilities and Improvement Authority) was a separate legal entity or simply an alter ego of the city.³¹ The Court in its analysis noted that, if the authority was a separate and distinct entity from the city, then "legal provisions applicable to public bonds, revenue or otherwise, need not be considered."³² While this opinion is instructive on how a court may analyze the nature of the Wyoming Energy Authority, it leaves certain questions unanswered—for example, whether a pipeline is a work of internal improvement under Article 16, Section 6 of the Wyoming Constitution.

²⁹ Id. at 1424–27. The panel did conclude that one factor—the WCDA was performing "central governmental functions"—weighed in the WCDA's favor. Id. at 1426.

³⁰ See Colby v. Herrick, 849 F.3d 1273, 1276 (10th Cir. 2017).

³¹ Laramie Citizens for Good Gov't v. Laramie, 617 P.2d 474, 481 (Wyo. 1980).

³² Id. There, the Court held that the authority was not a separate entity, because the city of Laramie stood to lose if there was a default on the bonds.

Here, it is not clear how a court would view the Wyoming Energy Authority. But there are several features that suggest that the Energy Authority may be considered an entity distinct from the state:

- The enabling statute describes the Energy Authority as a "body politic and corporate," with the authority "to sue and be sued";
- The Energy Authority can issue bonds and financing for other projects, can borrow funds, and is required to establish and collect fees;
- The Energy Authority's statutes allow state agencies to assist the Energy Authority;
- The Energy Authority must submit a budget for review by the Legislature, but any appropriation can be expended only for administrative purposes;
- The Energy Authority's statutes provide that the sole recourse of any party contracting with the Authority shall be against the Authority, and no cause of action can lie against the state or any political subdivision of the state.

Ultimately, how a court views the Energy Authority will depend on the facts and circumstances of the case and what factors the court considers in its analysis.

This summary is meant to provide a broad and basic overview of the Wyoming Energy Authority. If you have any questions, please let me know.